



George Pataki
Governor

Randy A. Daniels
Secretary of State

Selecting a Municipal Planning Consultant

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Program overview

- Reasons for hiring consultants
- Statutory authority
- Selection process
- Paying for consultants

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Consultant –

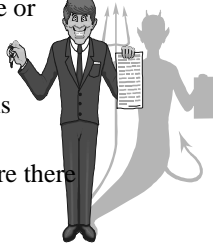
“one who provides professional advice or services for a fee”



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Why Hire a Consultant?

- To provide services which municipal employees don't have the time or ability to provide
- To provide an objective view
- To lend credibility to decisions
- To address legal requirements
- To facilitate and mediate where there are concerns over a project



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Who can be a “Consultant”?

- An individual or group of individuals
- One or more firms or companies
- A government agency
- College or university class or employee
- A not-for-profit group or agency

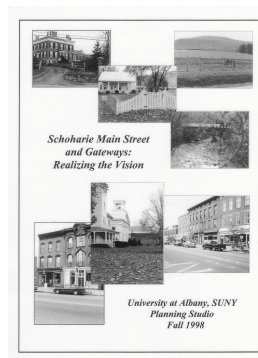
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Typical Consultant Services

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Planning Studies

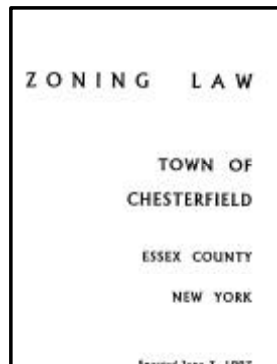
- Comprehensive
- Recreation
- Environmental
- Adult use
- Traffic



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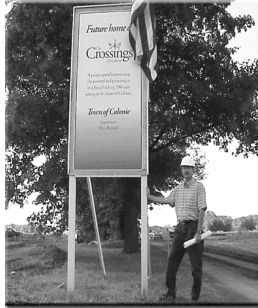
Preparation of Local Laws & Ordinances

- Zoning
- Subdivision
- Telecommunications
- Erosion & sediment control
- other



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Public Facility Planning & Design



- Feasibility studies
- Water /Sewer Lines & Treatment Works
- Municipal Buildings
- Parks and Playgrounds
- Construction management
- Grant and funding applications

Certain grant sources may require competitive bidding for consultant services

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Project Review Assistance



- Site Plan Review
- Special Use Permits
- Subdivision Review
- Stormwater Management Plans
- Erosion Control Plans

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Statutory Authority

General Municipal Law – Article 5-
A Section 103, 104-b

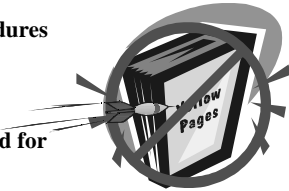
- Professional Services are not contracts for public work and are not subject to competitive bidding*.
- Non-bid procurements require that alternative proposals or quotations for goods and services be secured by use of written requests for proposals, written quotations, verbal quotations or any other method ...

* People ex rel Smith v. Flagg

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How do you find the right consultant?

- Develop formal procedures
- Consult with other municipalities
- Review work prepared for others



• By law, all local governments shall have written policies on file governing the procurement on non-competitively bid services.

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Do you think you need a consultant?

Ask yourself these questions first ...

- What is the issue, problem or project that you want addressed?
- What is the intended result?
- Is there a legal or political mandate that the project needs to be completed by a certain time?
- Is there political controversy surrounding the project or activity?
- Does the project or activity require a more detached, objective or innovative approach or expertise than can be provided by existing staff?

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Selection Process

Option A

Procedure	Advantages	Disadvantages	Appropriate use
Single-source procurement (Only one firm provides the services you seek)	<ul style="list-style-type: none"> • Allows the use of consultants with a long standing relationship to the community • Saves time 	<ul style="list-style-type: none"> • Appearance of impropriety 	<ul style="list-style-type: none"> • Existing satisfactory relationship with consultant • Project is of low cost • Only when there is no appearance of impropriety

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Selection Process

Option B

Procedure	Advantages	Disadvantages	Appropriate use
Selection on basis of pre-qualified firms	Saves time	Possibility of overlooking good consultants	Project may require a new approach or special skills

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Selection Process

Option C

Procedure	Advantages	Disadvantages	Appropriate use
Selection on basis of formal "Request For Qualifications"	Large number of consultants to choose from	Greater number of responses require more staff time on selection process	Low degree of confidence that the consultants can perform the specific work required

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Selection Process

Option D

Procedure	Advantages	Disadvantages	Appropriate use
Two step "Request for Qualifications and Request for Proposals"	<ul style="list-style-type: none"> Most competitive Provides detailed information about the consultant and its approach to the task. 	<ul style="list-style-type: none"> Lengthy and time consuming process Very costly process 	<ul style="list-style-type: none"> Large projects >\$50,000 Community is unsure about the approach to take Community is unsure about the skills needed for the task

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Requests for Qualifications

- The community interviews and selects qualified consultants based upon their ability to provide a specific service or services (ex. site & subdivision plan review, project design, stormwater plan review, SEQRA review).
- Used to establish a list of qualified firms.

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Request for Qualifications Content

- Description of problem
- Desired outcome or product
- Minimum desired qualifications
- Names of principals
- Names of key project personnel
- List of similar projects completed by firm
- Licenses and certificates held
- References

Saves Time & Money
*Fewer responses to
RFP's will need to be
prepared and
reviewed*

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Requests for Proposals

- The community identifies a particular function, activity or project it desires to accomplish and has a timetable and budget for its completion.
- Generally used to select a specific firm for a specific job.

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Request for Proposals Content

- Detailed description of the project
- Budgeted amount
- Expectations from respondent including staffing requirements
- Support to be provided by the issuing agency
- Minimum qualifications required
- Evaluation and selection process
- Response due date

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Advertising the RFQ/RFP

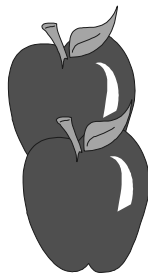
- Newspaper
- Trade publications
- WEB site
- Direct mail to listed firms
- Trade clearing houses (Dodge Reports)

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RFP Tips

• A well written RFP accurately conveys the full scope of the work desired, thereby enabling the consultant to address the project more precisely and to make realistic cost estimates

• Makes it easier for the reviewers to compare and evaluate the responses to the RFP



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Low Bidder

Not always a good idea for professional services

- May not gauge the competence & ability of a consultant
- May discourage creative thinking to address problem or design
- May encourage “shortcuts”
- May fail to address the scope of services



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Evaluating the Proposals

Does the response convey :

- An understanding of the project
- Proposed interaction with issuing agency
- Responsiveness to the request
- Evidence of enthusiasm and creativity
- Ability to complete project within time and budget
- Experience of the project manager and team members

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Rank the Proposals

- Use evaluation forms
- Establish criteria
- Relate a ranking score to a desired expectation
- Develop an overall rank for each proposal
- Select the top (*n*) for interviews

- ☐ Quality
- ☐ Technical approach
- ☐ Experience
- ☐ Management
- ☐ General quality
- ☐ Cost

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Conduct Consultant Interviews

- Develop interview rating sheets
- Prepare a set of questions to be asked
- Establish a scoring method based on established criteria
- Request that project managers attend interviews, not just firm principals
- Use a committee selection process
- Arrive at a consensus selection
- Check references



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Open Meetings Requirements



Any time a quorum of a **board or a quorum of a committee of a board** meets to discuss public business, the Open Meetings Law requirements must be complied with.

- Provide access to the public
- Provide notice to the press
- Post notice in a conspicuous place

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Can consultant interviews be conducted in executive session ?

... to discuss the qualifications of the firm or of individuals on the consultant team.

BUT, general discussion about the project must be held in open session.

YES ...

Public Officers Law §105(1)(f)

“... employment history of a person or corporation, or matters leading to the ... employment ... of a particular person or corporation.”

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Formalize your relationship

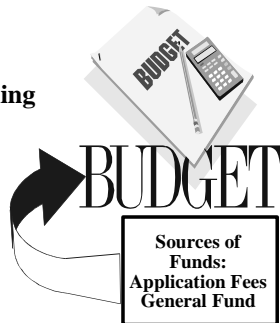
Contracts should contain:

- Scope of work
- Compensation and method of payment
- General terms and conditions
- Compliance with State requirements
- Hold-harmless clauses and insurance
 - Municipality should also be a named insured
- Product milestones and completion date
- Deliverables and their ownership
- Standard clauses

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Paying for Consultant Services

- Public Facility Planning & Design
- Planning Studies
- Preparation of Local Laws and Ordinances



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Paying for Consultant Services Project Review Assistance



Municipalities may, by local law, require applicants before any board to deposit funds in escrow for the re-imbursement of fees and expenses incurred in connection with the review of site plans, subdivision plans, stormwater, sediment and erosion control plans, SEQRA review fees or similar activities.

See: Town of Onondaga, LL # 1 of 1992.

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Tying up loose ends

- Notify unsuccessful firms – provide for debriefing if requested
- Make sure that all contracts and forms are properly completed, approved and filed
- Assign a project manager to oversee the work



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Conduct a programmatic evaluation

- Internal
 - How did the process work ?
 - Did you receive what you expected ?
 - Did you receive what you wanted when you wanted it ?
- External
 - Consultant interaction
 - Opportunities for improvement
 - How can you improve your process ?
- How can the consultant selection process be improved ?

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Department of State

(518) 473-3355

(518) 474-6740

(800) 367-8488



<http://www.dos.state.ny.us>

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Fee Structures for Engineers and Attorneys

This local law was discussed at the Association's Training School in the session entitled "Fees, Legal and Otherwise". We were asked to make it available to you. This local law was upheld by the Appellate Division Fourth Department in *Home Builders Association of Central New York, Inc. vs. Town of Onondaga* (1999 N.Y. slip op. 11217, December 30, 1999).

Local Law No. 1 of the year 1992 of the Town of Onondaga

Section 1. LEGISLATIVE FINDINGS, INTENT AND PURPOSE.

The town board hereby finds and determines that in order to protect and safeguard the Town of Onondaga, its residents and their property, with respect to certain land developments within the Town, all buildings, highways, drainage facilities, sanitary sewer facilities, other utilities and parks within said developments should be designed and constructed in a competent and workmanlike manner and in conformity with all applicable governmental codes, rules and regulations and dedicated and conveyed to the Town in a legally sufficient manner, that in order to assure the foregoing, it is essential for the Town to have competition engineers retained by the Town to review and approve plans and designs make recommendations to the Town Board and Planning Board, inspect the construction of highways, drainage, sewer, other facilities and parks to be dedicated to the Town and to recommend their acceptance by the Town, and to have competent attorneys retained by the Town to negotiate and draft appropriate agreements with developers, obtain, review and approve necessary securities, insurance and other legal documents, review proposed deeds and easements to assure the Town is obtaining good and proper title and to generally represent the Town with respect to legal disputes and issues with respect to developments, and that the cost of retaining such competent engineers and attorneys should ultimately be paid by those who seek to profit from such developments rather than from general Town funds which are raised by assessments paid by taxpayers of the Town.

This local law is enacted under the authority of subparagraphs (a)(12) and (d)(3) of the Municipal Home Rule Law Section 10(1)(ii) and Municipal Home Rule Law Section 22. To the extent Town Law Sections 274-a, 276 and 277 do not authorize the Town Board or Town Planning Board to require the reimbursement to the Town of legal and engineering expenses incurred by the Town in connection with the review and consideration of application for subdivision approval and for the approval, amendment or extension of planned districts under the Town's zoning ordinance, it is the expressed intent of the Town Board to change and supersede such statutes. More particularly, such statutes do not authorize the deferral or withholding of such approvals in the event such expenses are not paid to the Town. It is the expressed intent of the Town Board to change and supersede Town Law, Sections 274-a, 276 and 277 to empower the Town to require such payment as a condition to such approvals.

Section 2. DEFINITIONS.

As used in this local law, the following terms shall have the meaning indicated:

APPLICANT – Any person, firm, partnership, association, corporation, company or organization of any kind who or which requests the Town of its Planning Board or Town Board to approve a development.

DEVELOPER – Any person, firm, partnership, association, corporation, company or organization of any kind who or which constructs or proposes to construct one or more highways, drainage facilities, utilities or parks within or in conjunction with a development and to convey or dedicate same to the Town.

DEVELOPMENT – Shall mean and include, a subdivision or a planned district.

DRAINAGE FACILITY – All surface water drainage facilities, including, but not limited to, detention and retention basins, storm sewers and their appurtenances, drainage swales and ditches, and any easements through or over which said facilities may be constructed or installed in or in connection with a development.

HIGHWAY – The term “highway” included a street, avenue, road, square, place, alley, lane, boulevard, concourse, parkway, driveway, overpass and underpass and also includes all items appurtenant thereto, including but not limited to bridges, culverts, ditches, shoulders and sidewalks in or in connection with a development.

PARK – An area of land located within a development which is open to the public and devoted to active or passive recreation.

PLANNED DISTRICT – A planned residential district, planned residential community district, planned mobile home development district or planned economic district established under Section 35-19 of the zoning ordinance of the Town, including any site plan review pursuant to the Town (or any successor provision) or environmental review pursuant to the New York State Environmental Quality Review Act or Town of Onondaga Local law No. 6 – 1979.

SUBDIVISION – A subdivision of land pursuant to Town of Onondaga Local Law No. 1 – 1974 (as amended) and the land subdivision regulations of the Town, including any site plan review pursuant to Section 35-20 of the zoning ordinance of the Town (or any successor provision) or environmental review pursuant to the New York State Environmental Quality Review Act or Town of Onondaga Local law No. 6 – 1979.

TOWN – The Town of Onondaga.

UTILITIES – All water, sanitary sewer, gas, electric, telephone, cable television facilities and any easements through or over which said facilities may be constructed or installed in or in connection with a development.

Section 3. REIMBURSEMENT OF FEES AND EXPENSES.

A. Subdivisions.

1. The applicant, for approval of a subdivision in the Town, shall reimburse the Town of all reasonable and necessary engineering expenses incurred by the Town in connection with the review and consideration of such subdivision.
2. A developer who constructs, or proposes to construct, one or more highways, drainage facilities, utilities or parks within or in conjunction with an approved subdivision in the Town shall reimburse the Town for all reasonable and necessary legal and engineering expenses incurred by the Town in connection with the inspection and acceptance by the Town of such highways, drainage facilities, utilities and parks and the dedication of same to the Town.

B. Planned Districts.

1. An applicant, for the approval, amendment or extension of a planned district in the Town, shall reimburse the Town for all reasonable and necessary legal and engineering expenses incurred by the Town in connection with the review and consideration of said application.

2. A developer who constructs or proposes to construct one or more buildings, highways drainage facilities, utilities or parks within or in conjunction with a planned district in the Town shall reimburse the Town for all reasonable and necessary legal and engineering expenses incurred by the Town in connection with the granting of any building permit and in connection with the inspection and acceptance by the Town of such highways, drainage facilities, utilities and parks and the dedication of same to the Town.

SECTION 4. EXCEPTIONS.

A. The following developments are hereby excepted from the application of this local law:

1. Any development of land of one acre or less abutting an existing public highway.
2. Any subdivision of land into no more than two lots abutting an existing public highway.

B. Notwithstanding anything to the contrary contained in this local law, an applicant or developer shall not be required to reimburse the Town for any part of a legal or engineering fee incurred by the Town for services performed in connection with matters, including by not limited to those resulting from complaints by third parties, as to which the Town Board determines the applicant or developer had no responsibility or was beyond the reasonable control of the applicant or developer.

SECTION 5. DEPOSIT OF FUNDS AND PAYMENTS OF FEES.

A. Simultaneously with the filing of an application for approval of a development and prior to the commencement of any construction of buildings, highways, drainage facilities, utilities or parks therein the applicant or developer, as the case may be, shall deposit with the Town Supervisor a sum of money, as determined in Section 6 of this local law, which sum shall be used to pay the costs incurred by the Town for engineering and legal services as described in Section 3 of this local law.

B. Upon receipt of such sums, the Town Supervisor shall cause such monies to be placed in a separate non-interest bearing account in the name of the Town and shall keep a separate record of all such monies so deposited and the name of the applicant or developer and project for which such sums were deposited.

C. Upon receipt and approval by the Town Board of itemized vouchers from an engineer and/or attorney for services rendered on behalf of the Town pertaining to the development, the Town Supervisor shall cause such vouchers to be paid out of the monies so deposited, and shall furnish copies of such vouchers to the applicant or developer at the same time such vouchers are submitted to the Town.

D. The Town Board shall review and audit all such vouchers and shall approve payment of only such engineering and legal fees as are reasonable in amount and necessarily incurred by the Town in connection with the review, consideration and approval of developments and the inspection and acceptance of highways, drainage facilities, utilities and parks within or in conjunction with such developments. For purpose of the foregoing, a fee or part thereof is reasonable in amount if it bears a reasonable relationship to the average charge by engineers or attorneys to the Town for services performed in connection with the approval or construction of a similar development and in this regard the Town Board may take into consideration the size, type and number of buildings to be constructed, the amount of time to complete the development, the topography of the land on which such development is located, soil conditions, surface water, drainage conditions, the nature and extent of highways, drainage facilities, utilities and parks to be constructed and any special conditions or considerations as the Town Board may deem relevant; and a fee or part thereof is necessarily incurred if it was charged by the engineer or attorney for a service which was rendered in order to protect or promote the health, safety or other vital interests of the residents of the Town, protect public or

private property from damage from uncontrolled, surface water run-off and other factors, assure the proper and timely construction of highways, drainage facilities, utilities and parks, protect the legal interests of the Town including receipt by the Town of good and proper title to dedicated highways and other facilities and the avoidance of claims and liability, and such other interests as the Town Board may deem relevant.



STATE OF NEW YORK
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September 4, 1986

Mr. Kevin N. Dailey
Supervisor
Town of Clifton Park
One Town Hall Plaza
Clifton Park, NY 12065

The staff of the Committee on Open Government is authorized to issue to advisory opinions. The ensuing staff advisory opinion is based solely upon the facts presented in your correspondence.

Dear Supervisor Dailey:

I have received your letter of August 21 in which you requested an advisory opinion concerning the Open Meetings Law.

Specifically, according to your letter:

"The Town of Clifton Park is in the process of planning a Community Center. We are deciding now on what approach to take regarding the method of construction. We have been interviewing Architects and Construction Managers which could be hired by the Town while we are constructing this Center. This person/persons will be a paid employee of the Town of Clifton Park for the period of construction and design.

"These interviews have been closed to the press and the general public because they were personnel interviews and these individuals represented private companies' financial status. We also asked a few technical experts from our community to sit in on these interviews for the benefit of our Town Board who are not experts on building pools, ice rinks or senior centers."

Mr. Kevin M. Dailey
September 4, 1986
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Your question is whether the closed sessions that you described are consistent with the Open Meetings Law. In this regard, I offer the following comments.

First, as you are aware, the Open Meetings Law is based upon a presumption of openness. Stated differently, all meetings of a public body, such as the Town Board, are open to the public, except to the extent that discussions fall within the scope of one or more of the grounds for entry into executive session listed in section 105(1)(a) through (h) of the Law.

Second, of relevance is section 105(1)(f), which permits a public body to enter into an executive session to discuss:

"the medical, financial, credit or employment history of a particular person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of a particular person or corporation..."

Based upon the language quoted above, to the extent that the Board's deliberations focus on the "employment history of a particular person", matters "leading to the appointment" of a "particular person or corporation", or perhaps the "financial or credit history" of a particular corporation, I believe that an executive session could properly be held.

And third, with respect to the presence of persons other than members of the Board at executive sessions, section 105(2) of the Law states that:

"Attendance at an executive session shall be permitted to any member of the public body and any other persons authorized by the public body."

Like any provision of law, I believe that the Open Meetings Law should be given a reasonable interpretation consistent with its intent. If, for example, the Board invites those with special knowledge or expertise to be shared during an executive session, I believe that it would be reasonable for those others to join the Board in an executive session. On the other hand, it has been advised in the past that an arbitrary invitation to attend an executive session to those without expertise or whose presence may be irrelevant to the discussion would be unreasonable and inconsistent with the Law.

Mr. Kevin M. Dailey
September 4, 1986
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Lastly, it is reemphasized that only to the extent that specific portions of the discussions fall within the scope of section 105(1)(f) would executive sessions be appropriate. Other aspects of the discussion (i.e., "what approach to take" and the like) appear to deal with matters of policy that should be considered during open meetings.

I hope that I have been of some assistance. Should any further questions arise, please feel free to contact me.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
DEPARTMENT OF STATE
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March 9, 1998

Mr. Gerald C. Crowell
Superintendent of Schools
Beaver River Central Schools
P.O. Box 179
Beaver Falls, NY 13305-0179

The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence.

Dear Mr. Crowell:

I have received your letter of February 13 in which you sought an advisory opinion concerning the Open Meetings Law.

According to your letter, the Board of Education of the Beaver River Central School recently interviewed candidates for the position of athletic director, but no notice was given prior to those gatherings. Thereafter, a candidate was selected and appointed at an ensuing meeting.

In conjunction with the foregoing, you have asked whether the Board was required to have given notice prior to the meeting held to interview the candidates, and if so, whether a failure to have done so would invalidate the Board's subsequent appointment. In addition, had the Board given notice, you asked whether the interviews could have been conducted in executive session.

In this regard, I offer the following comments.

First, in a landmark decision rendered in 1978, the Court of Appeals, that State's highest court, found that any gathering of a quorum of a public body for the purpose of conducting public business is a "meeting" that must be convened open to the public, whether or not there is an intent to take action and regardless of the manner in which a gathering may be characterized [see Orange County Publications v. Council of the City of Newburgh, 60 AD 2d 409, affd 45 NY 2d 947 (1978)].

I point out that the decision rendered by the Court of Appeals was precipitated by contentions made by public bodies that so-called "work sessions" and similar gatherings held for the purpose of

discussion, but without an intent to take action, fell outside the scope of the Open Meetings Law. In discussing the issue, the Appellate Division, whose determination was unanimously affirmed by the Court of Appeals, stated that:

“We believe that the Legislature intended to include more than the mere formal act of voting or the formal execution of an official document. Every step of the decision-making process, including the decision itself, is a necessary preliminary to formal action. Formal acts have always been matters of public record and the public has always been made aware of how its officials have voted on an issue. There would be no need for this law if this was all the Legislature intended. Obviously, every thought, as well as every affirmative act of a public official as it relates to and is within the scope of one*s official duties is a matter of public concern. It is the entire decision-making process that the Legislature intended to affect by the enactment of this statute”
(60 AD 2d 409, 415).

The court also dealt with the characterization of meetings as “informal,” stating that:

“The word ‘formal’ is defined merely as ‘following or according with established form, custom, or rule’ (Webster*s Third New Int. Dictionary). We believe that it was inserted to safeguard the rights of members of a public body to engage in ordinary social transactions, but not to permit the use of this safeguard as a vehicle by which it precludes the application of the law to gatherings which have as their true purpose the discussion of the business of a public body” (id.).

Based upon the terms of the Open Meetings Law and its judicial interpretation, if a majority of the Board gathered to conduct public business, any such gathering would, in my opinion, have constituted a “meeting” subject to the Open Meetings Law.

Second, when there is an intent to conduct a meeting, the gathering must be preceded by notice given pursuant to §104 of the Open Meetings Law, convened open to the public and conducted in public as required by the Open Meetings Law. That provision states that:

“1. Public notice of the time and place of a meeting scheduled, at least one week prior thereto shall be given to the news media and shall be conspicuously posted in one or more designated public locations at least seventy-two hours before each meeting.

2. Public notice of the time and place of every other meeting shall be given, to the extent practicable, to the news media and shall be conspicuously posted in one or more designated public locations at a reasonable time prior thereto.

3. The public notice provided for by this section shall not be construed to require publication as a legal notice.”

Stated differently, if a meeting is scheduled at least a week in advance, notice of the time and place must be given to the news media and to the public by means of posting in one or more designated public locations, not less than seventy-two hours prior to the meeting. If a meeting is scheduled less than a week in advance, again, notice of the time and place must be given to the news media and posted in the same manner as described above, “to the extent practicable”, at a reasonable time prior to the meeting. Therefore, if, for example, there is a need to convene quickly, the notice requirements can generally be met by telephoning the local news media and by posting notice in one or more designated locations.

With respect to the enforcement of the Open Meetings Law, § 107(1) of the Law-states in part that:

“Any aggrieved person shall have standing to enforce the provisions of this article against a public body by the commencement of a proceeding pursuant to article seventy-eight of the civil practice law and rules, and/or an action for declaratory judgment and injunctive relief. In any such action or proceeding, the court shall have the power, in its discretion, upon good cause shown, to declare any action or part thereof taken in violation of this article void in whole or in part.”

However, the same provision states further that:

“An unintentional failure to fully comply with the notice provisions required by this article shall not alone be grounds for invalidating any action taken at a meeting of a public body.”

As such, when a legal challenge is initiated relating to a failure to provide notice, a key issue is whether a failure to comply with the notice requirements imposed by the Open Meetings Law was “unintentional”. If indeed the Board’s failure to provide notice was inadvertent and unintentional, such failure would not serve as basis for invalidating the Board’s action.

Lastly, had the Board fully complied with the Open Meetings Law, I believe that it could have conducted the interviews in private. As a general matter, the Open Meetings Law is based upon a presumption of openness. Stated differently, meetings of public bodies must be conducted open to the public, unless there is a basis for entry into executive session. Moreover, the Law requires that a procedure be accomplished, during an open meeting, before a public body may enter into an executive session. Specifically, §105(1) states in relevant part that:

“Upon a majority vote of its total membership, taken in an open meeting pursuant to a motion identifying the general area or areas of

Mr. Gerald C. Crowell

March 9, 1998

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the subject or subjects to be considered, a public body may conduct an executive session for the below enumerated purposes only..."

As such, a motion to conduct an executive session must include reference to the subject or subjects to be discussed, and the motion must be carried by majority vote of a public body's total membership before such a session may validly be held. The ensuing provisions of §105(1) specify and limit the subjects that may appropriately be considered during an executive session.

Relevant to the matter is §105(1)(f) of the Open Meetings Law, which permits a public body to enter into an executive session to discuss:

"...the medical, financial, credit or employment history of any person or corporation, or matters leading to the appointment, employment, promotion, demotion, discipline, suspension, dismissal or removal of any person or corporation..."

Under the circumstances, I believe that the Board would have considered the employment history of the candidates, and that the session would have involved a matter leading to the employment of a particular person.

I hope that the foregoing serves to clarify your understanding of the Open Meetings Law and that I have been of assistance.

Sincerely,

Robert J. Freeman
Executive Director

RJF:jm



STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

Opns St Comp, No. 97-25

CONFLICTS OF INTEREST -- Codes of Ethics (requirement that architectural review board members represent that they will not perform compensated services for applicants to the board until after the board approves the applications)

PUBLIC OFFICERS AND EMPLOYEES -- Ethics (performance of services by board member for applicant to the board)

GENERAL MUNICIPAL LAW, §§805-a(1)(c), 806(1)(a): A code of ethics may require a member of a municipal agency to represent that he or she will not agree to perform compensated services for an applicant to the agency until after the agency approves the application.

This is in reply to your request for our opinion concerning a proposed amendment to your town's code of ethics prompted by certain actions on the part of a member of the town's architectural review board.

You state that the board member in question is a sign maker who has been found to have drawn sketches of signs for applicants to annex to their applications to the architectural review board. You also state that the board member does not participate in the discussion or vote on such applications, but after the board approves the applications, the board member constructs and installs the signs for the clients under the approved application. We understand that the board member is not compensated for the sketches, but is compensated for the construction and installation of the signs. Under these circumstances, you ask whether the town's code of ethics may be amended to require existing board members to sign an affidavit representing that they will not perform compensated services for an applicant to their board until after an approval has been issued by the board.

The statutes relating to conflicts of interest of municipal officers and employees are contained in article 18 of the General Municipal Law (§800 et seq.). Section 805-a(1)(c) of the General Municipal Law provides that no municipal officer or employee shall:

receive, or enter into any agreement, express or implied, for compensation for services to be rendered in relation to any matter before any municipal agency of which he is an officer, member or employee ...

In addition to any other penalties provided by law, any person who knowingly and intentionally violates section 805-a may be fined, suspended or removed from office or employment in the manner provided by law (General Municipal Law, §805-a[2]).

Thus, section 805-a(1)(c) prohibits a member of a municipal agency, such as a town architectural review board, from agreeing, either expressly or by implication, to receive compensation for services in relation to any matter before the municipal agency for which he or she serves (see 1990 Opns St Comp No. 90-28, p 65). Moreover, section 805-a(1)(c) prohibits a member of a municipal agency from entering into an agreement for compensation for services rendered with respect to matters which must be reviewed, passed upon, or otherwise brought to the attention of the agency, even if the services are rendered before the matter is formally submitted to the agency (*id.*). Section 805-a(1)(c), however, does not prohibit the performance of uncompensated services (*id.*). Whether services are performed for compensation is a question of fact which should be determined, in the first instance, at the local level (see, e.g., General Municipal Law, §808, pertaining to local boards of ethics).

Section 806(1)(a) of the General Municipal Law, requires the governing body of each county, city, town, village and school district to adopt a code of ethics setting forth for the guidance of its officers and employees the standards of conduct reasonably expected of them. Among other things, a code of ethics must contain standards of conduct with respect to private employment in conflict with official duties (*id.*). A code of ethics may also regulate or prescribe conduct which is not expressly prohibited by article 18, and provide for the prohibition of conduct (*id.*). A code of ethics, however, may not be inconsistent with the provisions of article 18 (1992 Opns St Comp No. 92-30, p. 78; 1980 Opns St Comp No. 80-234, unreported; 1971 Opns St Comp No. 71-417, unreported; Belle v Town Board of the Town of Onondaga, 61 AD2d 352, 402 NYS2d 677). In this regard, a code of ethics may not authorize conduct otherwise prohibited by article 18 (General Municipal Law, §806[1][a]), nor may it prohibit conduct expressly permitted by article 18 (1992 Opns St Comp No. 92-30, supra).

A code of ethics, therefore, may not permit a member of a municipal agency to enter into an agreement for the performance of compensated services in relation to any matter which must be brought before the agency, or is pending before the agency, in violation of section 805-a(1)(c). A code of ethics, however, may require a member of a municipal agency to represent that he or she will not agree to perform compensated services for an applicant to the agency until after the agency approves the application. In the absence of any restrictions in section 806, it is our opinion that such a reporting requirement could be imposed on incumbent appointive officers (cf. Board of Education v PERB, 75 NY2d 660, 555 NYS2d 659, relating to the collective bargaining requirements applicable to the imposition of financial disclosure requirements).

We also note, however, that requiring a member of a municipal agency to represent that he or she will not agree to perform compensated services for an applicant to the agency until after

the agency approves the application implies that the agency member is free to perform uncompensated services for an applicant prior to final action by the agency, followed by the performance of compensated services after such action. In our view, the sequence of uncompensated and compensated services may give rise to at least the appearance of an express or implied agreement for compensated services entered into prior to final action by the agency in violation of section 805-a(1)(c).

The courts of this State have held public officials to a high standard of conduct and, on occasion, have negated certain actions which, although not violating the literal provisions of article 18 or a municipality's code of ethics, violate the spirit and intent of these enactments, are inconsistent with public policy, or suggest self-interest, partiality or economic impropriety (see, e.g., Zagoreos v Conklin, 109 AD2d 281, 491 NYS2d 358; Matter of Tuxedo Conservation and Taxpayers Ass'n v Town Board of the Town of Tuxedo, 69 AD2d 320, 418 NYS2d 638; Conrad v Hinman, 122 Misc 2d 531, 471 NYS2d 521). For example, in Matter of Tuxedo Conservation and Taxpayers Ass'n, *supra*, the court invalidated a town board's approval of a land use application because of the possibility that a board member's vote was influenced by the likelihood of his firm receiving a contract from a wholly-owned subsidiary of the applicant.

Thus, to avoid a similar appearance of impropriety, in lieu of the proposed affidavit requirement, the town should consider amending its code of ethics to supplement the provisions of section 805-a(1)(c) by prohibiting a member of a municipal agency from performing compensated services in relation to a matter previously before the agency. Additionally, to avoid an appearance of partiality on the part of the agency, the town may wish to consider an amendment which would restrict or prohibit a member of a municipal agency from performing uncompensated services in relation to any matter which must be brought before the agency. Even in the absence of any such amendment, however, it is our opinion that a member of a town's architectural review board should refrain from sketching, constructing and installing signs for applicants to the board¹.

January 12, 1998

John C. Jilnicki, Esq., Deputy Town Attorney
Town of East Hampton

¹Should the board member continue to sketch signs for applicants and continue to not participate in the discussion or vote on their applications, we note that Attorney General's Office has concluded that if an individual's work in the private sector necessitates numerous recusals from his or her official duties, it would be unwise for the individual to continue to serve on the board (see, e.g., 1989 Opn Atty Gen [Inf] No. 89-35, p 1067).

OFFICE OF THE STATE COMPTROLLER FINANCIAL MANAGEMENT GUIDE
MAJOR MANAGEMENT AREA - EXPENDITURES/EXPENSES

Section - Procurement	Issued 1973	Subsection 8.3020
Subsection - Procurement Policies and Procedures	Revised 12/93	Page 5

Categories of Procurements. After analyzing most proposed procurements of goods and services, you should find that they fit into one of the 16 categories on the following list. This list identifies whether these categories are subject to the competitive bidding requirements of Section 103 or the local policies required by Section 104—b, and where further information can be found.

	Subject to Competitive Bidding (§103)	Local Policies (§104-b)	Refer to Subsection, Page
<u>Purchase and Public Work Contracts</u>			
1. Purchase Contract - Above 10,000	x		8.3030, p. 1
2. Purchase Contract - below 10,000		x	8.3030, p. 1
3. Contract for Public Work - Above 20,000	x		8.3030, p. 1
4. Contract for Public Work - below 20,000		x	8.3030, p. 1
<u>Procurements Excepted from both §103 and §104-b</u>			
5. Agencies for Blind or Severely Handicapped, etc. (State Finance Law, Section 175-b)		x (A)	8.3030, p. 6
6. Correctional Institutions (Correction Law, Sections 184, 186)		x (A)	8.3030, p. 6
7. State Contract (GML, Section 104)		x (A)	8.3030, p. 6
8. County Contract (GML, Section 103[3])		x (A)	8.3030, p. 7
<u>Procurements Excepted from both §103</u>			
9. Emergencies (GML, Section 103[4])		x	8.3030, p. 8
10. Sole Source (For example, patented or monopoly item)		x	8.3030, p. 8
11. Professional Services		x	8.3030, p. 9
12. True Leases	x (B)	x	8.3030, p. 9
13. Insurance		x	8.3030, p. 10
14. Second-Hand Equipment From Another Government (GML, Section 103[6])		x	8.3030, p. 10
15. Certain Food and Milk Purchases (GML, Section 103[9][10])		x (B)	8.3030, p. 10
16. Certain Municipal Hospital Purchases (GML, Section 103[8])		x	8.3030, p. 10

(A) Although Section 104-b exempts these purchases from the requirement of written or verbal quotations or proposals, each political subdivision should include in their policies a provision to ensure that use of the exception is documented and in the case of State or county contracts that procurements from these sources are in the best interest of the unit. This could be accomplished by comparisons of prices to catalogs or other market price comparisons.

(B) School districts only.

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no substantial equivalent and which are, In fact, available from only one source (see, gen, 1986 Opns St Comp No. 86 - 25, p. 41). Thus, for example, if a political subdivision, acting in good faith and without intent to arbitrarily Inhibit or restrict competition determines that a particular patented item is required in the public interest and it is further determined that such item is available from one source so that no possibility of competition exists, competitive bidding may not be required for the procurement of the item.

In making these determinations, the political subdivision should document, among other things, the unique benefits of the item as compared to other items available in the marketplace; that no other item provides substantially equivalent or similar benefits; and that, considering the benefits received, the cost of the item is reasonable, when compared to other products or services in the marketplace. In addition, the political subdivision should document that, as a matter of fact, there is no possibility of competition for the procurement.

Professional Services. The courts have held that professional services are not contracts for public work, as that phrase is used in the bidding statutes, and, therefore, are not subject to competitive bidding procedures. The determination of whether the professional service exception is applicable in given situations must be made on a case-by-case basis, examining the particular services to be acquired.

Generally, professional services involve specialized expertise, use of professional judgment, and/or a high degree of creativity. In addition, although it has been held that the exception may apply, in proper circumstances, to contracts with a corporation, in these instances, the services generally are to be performed by particular designated individuals. Finally, the courts have noted that professional service contracts often involve a relationship of personal trust and confidence. Among the services which have been held to be exempt from competitive bidding under this exception are those of an engineer, architect, land surveyor, attorney and physician.

True Leases. The courts have held that “true lease” agreements are neither purchases nor contracts for public work and, thus, are not subject to bidding under General Municipal Law, §103. However, notwithstanding the judicial interpretation of Section 103, leases of personal property by school districts are subject to the competitive bidding requirements of General Municipal Law, §103 for purchase contracts (Education Law, §1725). Competitive bidding requirements may not be avoided by simply casting an agreement which is truly a purchase or contract for public work as a lease or rental.

SELECTION AND USE OF ENGINEERS, ARCHITECTS AND PROFESSIONAL CONSULTANTS

Guidelines for Public Agencies

-EXCERPT-

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MANAGING THE CONTRACT—WORKING WITH CONSULTANTS

Agency and consultant share a vital goal, successful completion of the work on schedule and within the budget. This bears repeating because it is only through strong cooperation, communication, mutual support, and a genuine sense of trust and confidence that the parties can achieve that goal. Among the important responsibilities of agency staff during performance of the consultant contract are:

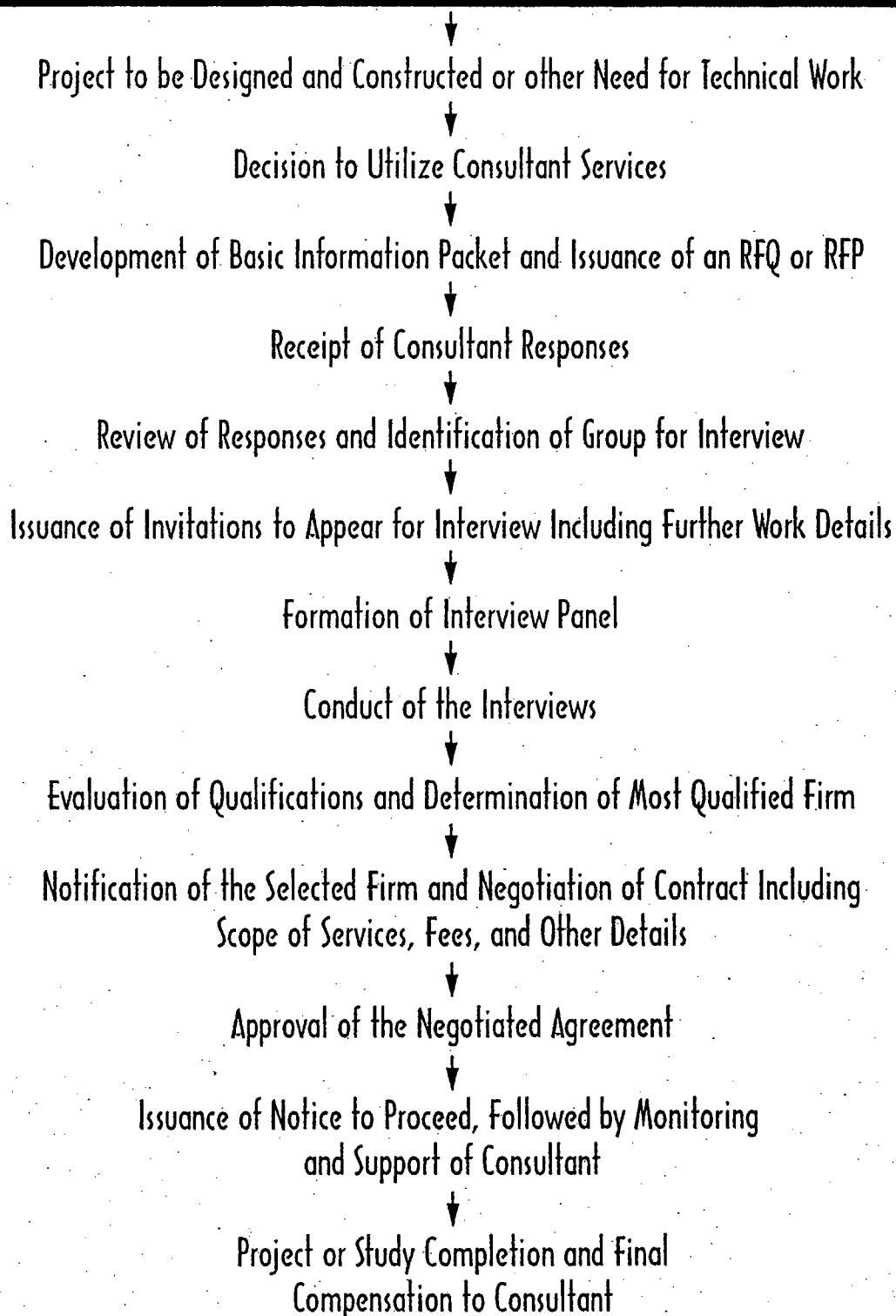
- To meet with the consultant before the work commences to set a proper tone for working together and to resolve any initial concerns or questions;
- To monitor performance and move promptly to correct problems of both substance and timing, which is best done through frequent communication, summarized in periodic written consultant status reports;
- To be reasonably available for consultant contacts, including backup staff arrangements to minimize delay;
- To make all reasonable efforts in timely support and facilitation of the consultant's performance, such as information flow, reviews and approvals, problem solving, etc.;
- To ensure that agency deliverables are provided fully and on schedule;
- To link the consultant's work with involved and affected parties, client departments, regulatory authorities, and the public, especially regarding reviews and approvals;
- To be firm-but-fair regarding rights and responsibilities of both the agency and the consultant;
- To assist in providing formal notices and/or publicity related to progress of the work;
- To encourage use of an interactive process;
- To work closely with the consultant in arranging and conducting meetings; these may be public participation sessions, formal presentations, or technical liaison. Staff should directly participate as appropriate, including moderator functions;
- To coordinate as necessary with related work of others including consultants, agencies, staff, departments, etc.;
- To arrange timely payment for work properly completed;
- To keep top officials and the governing body adequately informed on progress; and
- To arrange suitable recognition for contributions to success of the completed work.

The agency client has a critical responsibility to provide trained, competent personnel to work with the consultant and oversee performance. Most top agency administrators lack sufficient free time to work directly with consultants. Staff liaison people must be assigned for the day-to-day coordination and monitoring, and they must be properly briefed and trained on what is needed and expected. They should possess positive personality traits, particularly common sense, inquisitiveness, communications ability, people orientation, and initiative. Liaison staff will benefit greatly from the guidance and assistance of written policies and/or procedures. Top administrative officials must receive regular status reporting, give overall supervision, and personally participate when and as needed.

Monitoring is greatly facilitated when the consultant provides the agency with pertinent performance graphs, computerized project control printouts, lists of milestones completed, annotated schedules, or other items developed and used by the firm in its management of the contract.

At the conclusion of the contract, many agencies take steps to document the project experience and consultant performance. This is best done in writing and may include comments from the agency's clients and the consultant. This information is valuable in improvement of consultant selection processes, staff's role(s) in both selection and performance of the contract, and related policies and procedures.

TYPICAL FLOWCHART USE OF CONSULTANT SERVICES



APPENDIX E

SAMPLE LOCAL AGENCY QBS CRITERIA FOR USE IN CONSULTANT SELECTION

The following list is generally based on one which has been used successfully for over 25 years (without significant change or controversy) by a medium-size city which engages consultants for the bulk of its design work.

- Educational background of key consultant personnel;
- Experience record of the consultant team;
- Record of success by the consultant, demonstrated by work previously performed for the agency or similar work performed for others;
- Individual within the consultant's organization who will have direct charge of the work;
- Whether the consultant has adequate staff or other resources such as subconsultants to perform the work within the time allowance;
- The approach the consultant proposes to use for the work;
- The ability of the consultant to make effective public presentations of the report and/or design as may be required;
- The ability of the consultant to work effectively with agency staff other public agencies, and related parties as may be required during the course of the design, study, or other technical services;
- Pertinent new ideas which may be presented by the consultant during the course of the selection process;
- Where appropriate, whether the consultant has adequate knowledge of local conditions;
- Whether the consultant has supplementary technical certifications appropriate to the work involved;
- Whether the consultant has available experienced, capable, and acceptable resource and design professional personnel or consultants as may be pertinent to the particular project;
- Whether the consultant has demonstrated an appropriate level of effort as reflected by person-hours and classification of personnel allocated to the various tasks;
- Demonstrated continuing interest by the consultant in the success, efficiency, and workability of facilities the consultant has designed, both during construction and after they are placed in operation;
- Whether the consultant is already engaged in another project which has direct and substantial physical relationship to the proposed project;
- When an existing facility is being modified or added to, whether the original designer of the facility should be retained for the new work on grounds of

economy, detailed knowledge of the existing facility, or aesthetic or technical necessity of involving the same design philosophy;

- Whether the consultant has an effective quality control program, such as independent design review;
- The consultant's record of keeping construction costs within project budgets and design estimates;
- The consultant's ability to furnish adequate and effective construction supervision services, where such services are an inherent part of a "package" of services for which the consultant is employed;
- Financial stability and capacity of the consultant to carry out the kinds and extent of work needed;
- Availability to the consultant of adequate amounts and forms of liability and professional responsibility insurance;
- Whether the consultant has offered an appropriate response to relevant policy regarding involvement of minorities, women, disadvantaged business, affirmative action, etc.; and
- Other factors or special characteristics of the firm, its project team, or its outlook which provide a unique match with the agency's needs and/or objectives.

This agency is the commercial center of a large region and has many consultant firms with home or major branch offices within its boundaries. Accordingly, it also uses several "tie breaker" criteria:

- All other things being equal, local consultants are preferred to non-local consultants;
- All other things being equal, non-local consultant firms which include local consultants on their team are preferred to non-local firms which do not; and
- All other things being equal, consultants who have not worked for the agency recently are preferred to those which have.

The above criteria reflect important qualifications based considerations in both technical and policy areas. Agencies may find that one or more are not applicable to their needs or that additional criteria should be included (examples might be minority and disadvantaged business provisions or ensuring fair distribution of the work over time including to local firms). Such policies may also include the assignments of weights to the selected criteria for guidance or assistance to members of interview panels. It is vital, however, that no criteria be included that interfere with or eliminate the underlying principle of Qualifications Based Selection.

APPENDIX L

WHERE TO OBTAIN ADDITIONAL INFORMATION OR ASSISTANCE

American Consulting Engineers Council (ACEC)
1015 15th Street, NW #802
Washington, DC 20005
Phone: 202-347-7474
Fax: 202-898-0068
E-mail: acec@acec.org

American Institute of Architects (AIA)
1735 New York Avenue, NW
Washington, DC 20006
Phone: 202-626-7300
Fax: 202-626-7421
E-mail: sandstromc@aiaemail.aia.org

American Public Works Association (APWA)
2345 Grand Boulevard, Suite 500
Kansas City, MO 64108-2625
Phone: 816-472-6100
Fax: 816-472-1610
E-mail: apwa@mail.pubworks.org

American Society of Landscape Architects (ASLA)
636 Eye Street, NW
Washington, DC 20001-3736
Phone: 202-686-2752
Fax: 202-686-1001
E-mail: landnet@asla.org

Association of Consulting Engineers of Canada
(ACEC)
130, rue Albert Street, Suite 616
Ottawa, ON, Canada K1P 5G4
Phone: 613-236-0569
Fax: 613-236-6193
E-mail: memserv@acec.ca

National Society of Professional Engineers (NSPE)
1420 King Street
Alexandria, VA 22314-2794
Phone: 703-684-4811
Fax: 703-836-4875
E-mail: customer.service@nspe.org

Professional Engineers in Private Practice (PEPP)
(A division of NSPE; see listing above)
E-mail: pepp@nspe.org

Appendix B. Evaluation Forms

The Economics Consulting Evaluation Sheet and the Interview Rating Sheet, developed for a specific project, are both from the city of Los Angeles. They do not rely on numerical ratings but provide guidance to agency personnel on the criteria that should be considered. The

Consultant Selection Evaluation Form, from Tallahassee-Leon County, Florida, attempts to quantify evaluators' reactions. Neither type of form is proposed as a model; they are, however, examples of forms that cities are using and have found helpful.

RSO-EIR Economics Consulting Evaluation Sheet

Name of Firm _____

Rater _____ Date _____

Overall Ranking

--

1. Quality and commitment of personnel to be assigned
 - a. Experience of the director or principal investigator in the area of study and demonstrated competence to perform the work.
 - b. Experience and demonstrated competence of technical staff to be assigned to the project.
 - c. Level of commitment of personnel, both supervisory and technical, to this project.
2. Technical approach
 - a. Do they indicate familiarity with rent stabilization issues and data?
 - b. Are their proposed revisions to the work program logical and feasible?
 - c. If they are proposing a specific approach, do they have the requisite resources (e.g., computers for modeling) to accomplish this approach?
3. Experience and resources of the firm
 - a. Do they have experience in housing or rent control issues?
 - b. Do they have adequate resources (e.g., library, data, models if proposed) within their organization to conduct the study?
 - c. Do they have adequate depth of staff to perform the specialized analyses (e.g., forecasting, energy)?
4. Management structure for this study
 - a. Is the management organization they are proposing appropriate for this study?
 - b. If they are using subcontractors, do the subcontractors contribute significantly to the strength of the team and are the management controls adequate to ensure efficient use of the subcontractors?
5. General quality and responsiveness
 - a. Do they understand the purpose of the study?
 - b. Are they responsive to the requirements of this study (e.g., ability to work with managing consultant and steering committee)?
 - c. Are they perceived as neutral analysts on the issue of rent control?
6. Cost
 - a. Reasonableness of billing rates.
 - b. Cost as related to quality of personnel.

	Weak	Medium	Strong
1.			
2.			
3.			
4.			
5.			
6.			

Additional comments:

Appendix D. Evaluation Form for Selecting Consultants

Name of Consulting Firm: _____

A Factor	B Evaluation (1 to 5)*	C Weight	D Score**
Objective Factors (List)			
Qualifications			
Value			
Understanding of Project			
Approach to Project			
Quality of Work			
Personnel			
Intangible Factors			
TOTAL	N.A.	100	

* 1 = substantially below expectations; 2 = somewhat below expectations; 3 = meets expectations; 4 = somewhat above expectations; 5 = substantially above expectations

** Column B times Column C

Names and Titles of Persons from Firm Attending Interview:

Other Notes:

Commentary: The purpose of this form is to provide a structure for making comparative evaluations of consulting firms competing for a particular project. The first step in using this form is to establish the relative weights of various factors by assigning to Column C numbers that will total to 100. Different weighting systems will be appropriate for different projects, but the same weighting system should be used for all consulting firms competing for the same project. In general, firms falling below "3" in either of the first two rows on this form (objective factors and qualifications) should not be considered further. If all of the firms under consideration fall below "3" in those two rows, there is a serious problem in the selection process. That problem may be no more than unrealistic expectations on the part of the selection committee, but the problem should be addressed before the selection process proceeds further. The factors used in this chart are discussed in some depth at the end of Chapter 2.

It is important to note that this chart, or any similar device, may seem to make a science out of an art. Hiring a consultant, like hiring an employee, ultimately involves a certain amount of judgment that cannot be adequately represented on the chart. The selection committee should use this chart as a "reality check" on its judgment, not to override that judgment. If two firms are well above the others and separated by only a few points, it is perfectly reasonable for the selection committee to hire either of those firms; it should not feel constrained to selecting the one with the most points. On the other hand, if there are firms with 402, 352, and 298 points, and the committee is leaning toward hiring the firm with 298, the committee should reexamine its criteria because the objective evaluation does not match the committee's judgment.

Interview Rating Sheet

Candidate _____

Firm _____

Rank Among Other Interviewees _____

(1 through 5)

Time in _____

Time out _____

Interviewer _____

WEAK ACCEPTABLE OUTSTANDING

Time available to devote to project			
Understanding of overall concept and objectives			
Ability to maintain professional neutrality on issue			

BACKGROUND

Relatedness of educational background			
Experience in preparation and processing of EIRs			
Experience in large, complex EIRs			
Experience with public controversy			
Experience in managing a multiplicity of experts			
Experience with housing issues			
Experience in data analysis			

How would firm back up individual in case of illness?

Hourly rate

Previous work on rent control?

Overall impression

Consultant Selection Evaluation Form
(Tallahassee-Leon County Housing Element)

Firm

[illegible]

